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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of Case.

This case comes before this court upon a writ of error addressed to the District Court of the United States for Porto Rico (30) to review a judgment of that court entered June 1, 1905, in favor of Julio P. Castro, the plaintiff below and defendant in error here, for the sum of sixteen hundred dollars (9).

The action, which is in case, was begun in said district court on March 14, 1905, by filing in the clerk's office of said court for the district of Mayaguez a declaration wherein

the plaintiff Castro, "a citizen of Porto Rico," alleged that by reason of the negligence of the American Railroad Company of Porto Rico, "a corporation *existing* under and by virtue of the laws of the State of New York," his unmarried daughter, Eloisa, a minor, seventeen (17) years of age, had been run over and killed by a train of said company at a certain unprotected grade crossing on its line.

The accident occurred on the 18th day of February, 1905. The deceased, Eloisa, while riding with her mother, Felicia Cardone de Castro, in a certain coach driven by Francisco Rodriguez, attempted to pass over the tracks of the defendant company at the intersection of the public highway therewith, when the coach was run into by one of defendant's steam-engines drawing a train of cars.

Plaintiff, among other supposed derelictions on the part of defendant, alleged that it was particularly negligent in that its servants failed to give any warning of the approach of said engine and train towards said crossing, and in failing to have "any flagman or other servant" stationed at said crossing to warn passers-by of the approach of said train, and also in failing to maintain at the point in question "any gates to keep persons, vehicles, and the public from entering in and upon said tracks while the said engine, coaches, and cars were passing over said highway;" by reason whereof the collision complained of occurred, and "the said Eloisa Castro was so greatly bruised, mangled, and hurt that she died almost instantly after the said collision," and plaintiff suffered damage by "the careless and negligent acts of the defendant's agents, servants, and employees, as aforesaid, in causing the death of his said daughter, the said Eloisa Castro, who at the time of her death and at all times prior thereto had been making her home with plaintiff, in the sum of fifteen thousand dollars ($15,000) (2, 3).

The summons served upon the defendant required it to appear and answer said declaration "at the clerk's office of this court at Mayaguez, Porto Rico" (4).

The defendant appeared in obedience to the summons and interposed a demurrer to the declaration, setting forth three grounds of objection thereto, viz:

(1st.) That said declaration did "not set forth a cause of action."

(2d.) That plaintiff ought not to recover against defendant for the reason that "by the laws of Porto Rico plaintiff would be entitled only to support from the deceased daughter, Eloisa Castro, if any right of action he may have at all," and that such support, if any right of action to recover the same existed, could only be awarded to plaintiff "by monthly payments in advance."

(3d.) That any right to support which said plaintiff may have had, so far as the deceased, Eloisa, is concerned, ceased at her death (4, 5).

Subsequently defendant filed a plea to the jurisdiction of the court sitting at Mayaguez to try the cause, asserting that under and by virtue of the terms and provisions of section 670 of the Revised Statutes of the United States, read in connection with the provisions of the act of March 12, 1900, commonly called the Foraker act, the terms of the District Court of the United States for the District of Porto Rico authorized to be held at Mayaguez were but "special terms," and that said court when holding such terms was without jurisdiction to empanel a jury (5). The plea to the jurisdiction came on for hearing before the Honorable Charles F. McKenna, district judge, "at an adjourned term of the District Court of the United States of America within and for the District of Porto Rico convened for and to be begun and holden at the court-rooms of said court, in the city of Mayaguez," on the 24th day of May, 1905 (1), and the same having been overruled and exception to such action of the court having been noted, defendant's demurrer to the

declaration was considered and overruled, and to this action of the court defendant also noted an exception (5). Subsequently, defendant admitting that it was a corporation "existing under and by virtue of the laws of the State of New York, and that at the time mentioned in the said complaint it operated a steam railroad in the island of Porto Rico," pleaded in effect the general issue and also pleaded specially contributory negligence on the part of the deceased and her companions in recklessly driving upon the defendant's right of way in front of the advancing train (6). To certain features of this plea plaintiff interposed a demurrer (7), which demurrer was overruled (5). Thereupon a jury was duly empaneled and sworn (8), and testimony having been submitted on behalf of both parties, the cause was argued to the jury by counsel for each; and the jury, having been charged by the court, on May 31, 1905, returned a verdict for the plaintiff in the sum of sixteen hundred dollars ($1,600.00) (9).

On the next day, namely, June 1, 1905, the defendant, by its attorneys, filed a motion in arrest of judgment based upon the grounds following, viz:

(1st.) That the court "was without jurisdiction to try this cause before a jury, this term being a *special term* of court, and not being a regular term provided by act of Congress of the United States, and particularly because of the provisions of section 670 of the Revised Statutes of the United States."

(2d.) "Because plaintiff has no cause of action herein," * * * "since by the law of Porto Rico the only cause of action which plaintiff might have would be an action for support, and not an action for damages, as prayed" (10).

This motion in arrest of judgment was heard and overruled the same day (10).

In the course of charging the jury the trial judge, among other things, said:

> "Now, gentlemen of the jury, this case has attracted very considerable attention in Porto Rico, but the questions involved are familiar and similar cases are of most frequent occurrence unfortunately in the United States, because both the State courts and the Federal courts are filled with cases known as grade-crossing cases, known as negligence cases, known as contributory-negligence cases, so that the principles involved are very familiar to courts and to lawyers." * * * "It is charged by the plaintiff—and testimony has been offered in support—that this railroad company chartered under the laws of *Porto Rico* (New York) and operating in pursuance of the laws of Porto Rico, was obligated and bound by those laws to maintain at the crossing in evidence here, a watchman and a gate to prevent accidents. They complied with that law, according to the evidence, for two or three years, several years possibly, but in August, 1899, at the time of the devastating cyclone on this island, the watchman's house was destroyed and the gate injured, and from that time to the present, so far as the evidence is concerned in this case, neither the watchman nor the gate at that crossing was restored or maintained.
>
> "It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that [it] made this company liable to the plaintiff for damages" (16) * * *
>
> "That, * * * in reference to the gate and the watchman, the company stands here acknowledged and admitted failing to comply with that part of the

law in requiring them to maintain a watchman and a gate at that crossing.

"Now, the plaintiff contends as a matter of law—and asked me to so charge—that the failure to maintain the watchman and the gate and continue them at the crossing was such a failure of law, violation of law, such a flagrant neglect of duty on the part of this defendant that, no matter if plaintiff himself, by his driver, was guilty of contributory negligence, the action would not be barred or defeated on that account." * * *

"Now we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself" * * * (17).

"Now, gentlemen of the jury, coming to the question of damages, these kinds of actions are *not* of very frequent occurrence in most of the States of the Union. They are brought to recover the loss of the prospective earning power of a minor. Parents are entitled in most of the States to whatever their children earn until they are twenty-one years of age. And in the State courts and courts of the United States, the measure of damages allowed is what would be the earning power of a child until he was 21 years of age, less the cost of maintenance, assuming him to be wrongfully killed by the negligence of the defendant. This suit presents the case of a young lady 17 years of age, the daughter of a respected citizen, a young lady who had graduated from school, was about entering society. There is no evidence here for your consideration, that I heard, about any pecuniary value that the father expected to reap from her. Her station, position and all that we heard no testimony on (18). In the measure of damages, if there is any, the earning power which he would be entitled to would be one of the elements of damages. There is no proof offered on the subject of the pecuniary value of this girl's life. I mean in the earning power." * * *

"While you are governed and required by the statutes of Porto Rico to render just damages, if you find damages are to be allowed, those just damages are controlled by rules and regulations which prevent anything like conjecture or guesswork." * * *

> * * * "Now those seem to be the limitations put upon the allowance of damages here; the comfort and the society, the support and protection of deceased, and you heard the testimony on that subject; that the father had educated this young lady; that she was a comfort to him and he enjoyed her society, which would be natural, and death has deprived him of that." * * * "As I said before, I do not recall any testimony here about the pecuniary loss that the father sustained in this case. No evidence was offered on that subject and I cannot state that, in the absence of any evidence on that subject, you are at liberty to go into the domain of conjecture in reference to the pecuniary loss that has been sustained, there being no proof on that subject. But there is proof and evidence growing out of the circumstances of this case for you to take into consideration, if damages are adjudged by (19) you to be proper in the case under the evidence, as to the loss of companionship and the society and comfort of this young lady to her father, the affection existing between them" (20).

Before the jury retired defendant excepted to so much of the court's charge, above set forth, as related to any supposed obligation on the part of the defendant under the laws of Porto Rico to maintain a gate across the crossing and a watchman to attend the same, and particularly to so much of said charge as declared that "the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, is negligence in itself," such exception being specifically based upon the fact "that no law of Porto Rico at the time of the accident required the maintenance of a gate or watchman at the crossing where the accident occurred" (20).

Defendant also excepted to so much of said charge as instructed the jury that—

> "a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another, (and) that such damages may be given as, under all the circumstances of the case, may be just. And in determining this

> question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, * * * the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they should place upon her in future years. And you may take into consideration all these things in determining what the plaintiff should receive as compensation for" his loss (21).

Before the jury retired the defendant requested the court to instruct the jury "that defendant company was not obliged by law to maintain a chain, gate, or watchman at the crossing where the accident occurred, and that it and its servants and employees in the operation of the trains were only (to be) held to the exercise of ordinary diligence in avoiding accident at that place." This request was refused, and in lieu thereof the court gave the following instruction:

> "Under existing laws of Porto Rico, continued under the express provisions of the Foraker law and amendments, under which Congress of the United States created government of Porto Rico, the police regulation governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of the United States and of Porto Rico, never having been repealed."

To this action of the court defendant duly excepted (23).

Defendant further requested the court to instruct the jury that—

> "if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.
>
> "You are further instructed that in awarding damages you are not at liberty to allow damages on the

> ground of sympathy, sentiment or speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of evidence."

This instruction, as asked, was refused by the court, but the same was given with the following modification:

> "The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed."

To the action of the court in this particular defendant also duly excepted (24).

Assignments of Error.

Among other errors assigned on behalf of the American Railroad Company of Porto Rico defendant in the court below, are the following:

1.

"That the court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez, and therefore, by virtue of the provisions of section 670 of the Revised Statutes of the United States, the District Court of the United States for Porto Rico had no jurisdiction to try this cause before a jury at such special term of the said court begun and held at the city of Mayaguez aforesaid" (25).

2.

"The court erred in overruling defendant's demurrer to the complaint" (25).

4.

Error on the part of the court in instructing the jury that defendant company was obliged by the existing law of Porto Rico to maintain and operate a gate at and across the crossing in question and that the failure of said company to maintain such a gate and watchman, as required by law, was negligence *per se* (26).

Error on the part of the court in so much of its charge to the jury as asserted the right of a father under the laws of Porto Rico to maintain an action for the death of his minor child caused by the wrongful act or neglect of another, and that in such a case "such damages may be given as, under all the circumstances of the case, be just, and that in determining such question the jury should take into consideration all the circumstances of the case, the age of the deceased, the kind of girl she was," * * * "the assistance that she might have been to the parents in future years, and * * * "the loss of society and comfort and the reliance that they could place upon her in future years" (27).

9.

Error on the part of the court in instructing the jury to the effect that the police laws and regulations of Porto Rico governing the operation of railroads and requiring the maintenance of gates at railroad crossings was continued in force by the express provisions of the Foraker law and amendments, and that said police regulations were compatible with the laws of the United States and of Porto Rico and had never been repealed.

11.

Error on the part of the court in refusing to instruct the jury, as requested by defendant, that if they should find for the plaintiff they should "only allow such damages as have

been proven in the case," and if plaintiff had "not been deprived of any financial support or assistance by reason of the death of his said daughter," then no damages should be awarded to plaintiff on such account, and also in modifying such request for instruction and giving the same as modified to the effect that if they found for the plaintiff at all they should "allow such damages as you may, under the evidence and circumstances, consider as just" (24).

Jurisdiction.

On appeal to or writ of error from this court to review a decree or judgment of the District Court of the United States for Porto Rico this court has the power and it is its duty, first, to determine the question of its own jurisdiction in the premises, and, secondly, the jurisdiction of the lower court to render the judgment sought to be reviewed.

As the jurisdiction of the United States District Court for Porto Rico depends solely upon the proper interpretation and the application of the acts of the Congress in that behalf enacted, and as under the terms of such acts this court has jurisdiction to review the decrees and judgments of said district court in all cases where an act of Congress is brought in question and the right claimed thereunder is denied, it would seem that this court has jurisdiction to review any judgment of the District Court for Porto Rico in any cause wherein the jurisdictional power of said district court to render such judgment is alleged to have been exercised contrary to the provisions of the statutes upon which the right to render judgment depends, if it exists at all.

In the present case the jurisdictional power of the trial court to hear and determine, at a *special term* of said court held at Mayaguez, the issues raised by the pleadings was expressly drawn in question by a timely plea interposed on behalf of the defendant, and the right of the defendant under the provisions of section 670 of the Revised Statutes of

the United States, extended to Porto Rico by the act of April 12, 1900 (31 Stat., 85, c. 191), to be exempt from trial before a jury empaneled in the Mayaguez district, so asserted, was expressly denied.

As this court has jurisdiction on appeal or writ of error to review the judgments of the United States District Court for Porto Rico in all cases in which it would have jurisdiction to review the judgments of a supreme court of a Territory, and also in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied (act of April 12, 1900, *ubi supra*), it would seem to be reasonably clear that defendant in error's motion to dismiss the writ of error herein, which is now pending before this court, should be denied.

AS TO THE JURISDICTION OF THE DISTRICT COURT OF PORTO RICO.

Did the District Court of the United States for the District of Porto Rico have jurisdiction to hear and determine this cause?

Section 34 of the act of April 12, 1900 (*ubi supra*), declares that:

> "The District Court of the United States for Porto Rico" * * * "shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, *and shall proceed therein in the same manner as a circuit court.*"

The jurisdiction so conferred was amplified by the provisions of the act of March 2, 1901 (31 Stats. L., 953), section 3 of which reads as follows:

> "That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth,

> nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

As appears from the first paragraph of the declaration, which contains the averment of citizenship, upon which the sole right of the District Court of the United States for Porto Rico to maintain the action depends, discloses the fact that the plaintiff is a citizen of Porto Rico, who possessed no right in himself to invoke the jurisdiction of said court. Jurisdiction must be sustained, if at all, upon the ground that the party defendant, the American Railroad Company of Porto Rico, which is averred to be "a corporation existing under and by virtue of the laws of the State of New York," is a *citizen of the United States* within the purview of the last above quoted statute.

If the principles underlying the decision of this court in the case of the United States *vs.* Northern Express Company, 164 U. S., 687, apply here, then the trial court, in so far as the case at bar is concerned, probably had jurisdiction of the cause; but if such principles are not applicable to the present case, then the trial court was without any jurisdiction whatever in the premises and the cause should have been dismissed. Such course not having been pursued, this court is possessed of jurisdiction and power to reverse the judgment of the lower court and remand the same with instructions to enter such judgment of dismissal.

But, assuming for purposes of argument that the cause was one of which the United States District Court for Porto Rico had cognizance by reason of the citizenship of one of the parties, did that court have jurisdiction to hear and de-

termine such cause at a *special term* of the court held at Mayaguez?

In establishing the District Court of the United States for Porto Rico, section 34 of the act of April 12, 1900 (*ubi supra*) also provided that—

> "regular terms of said court shall be held at San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and *special terms may be held at Mayaguez* at such other stated times as said judge may deem expedient."

Said district court, by the very terms of the act which established it, is required to proceed in all cases of which it has cognizance "in the same manner as a circuit court," and as two qualities of terms which said court may hold, namely, "regular terms" and "special terms," are expressly provided for, it is necessary to ascertain in what manner a circuit court of the United States under the statutes in force on April 12, 1900, or thereafter could proceed when holding a special term.

The law of the United States bearing upon this point, which was in force both on April 12, 1900, and at all times thereafter up to the present moment, is section 670 of the Revised Statutes of the United States, which reads as follows:

> "At any special term of a circuit court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin, any business may be transacted which might be transacted at any regular term of such court. At any special term of a circuit court in any other district, it shall be competent for the court to entertain jurisdiction of and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motions for a new trial, and all other motions, and to award executions and other final process, and to do and transact all other business, and direct all other pro-

> ceedings, in all cases pending in the circuit court, *except trying any case by a jury* in the same way and with the same effect as the same might be done at any regular session of said court."

Under section 34 of the act of April 12, 1900, Porto Rico is constituted "a judicial district, to be called 'the District of Porto Rico.'" As such it is a district "other" than a district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin.

By section 14 of said act of April 12, 1900, the statutory laws of the United States not locally inapplicable, and except as expressly otherwise provided, are declared to have the same force and effect in Porto Rico as in the United States.

Section 670 of the Revised Statutes of the United States, above quoted, is a law of general application not locally inapplicable, and it would seem to restrict and control the proceedings of the District Court of the United States for Porto Rico, sitting within the district of Porto Rico, as sharply and precisely as it restricts and controls the proceedings of any circuit court of the United States sitting in any judicial district not lying within the excepted States specifically named therein.

At the date of the passage of the act of April 12, 1900, the distinction between "general" terms and "special" terms in the practice and procedure of the circuit courts in the United States was well known to Congress, and when that body deliberately provided for both kinds of terms it must be presumed to have employed its words of definition in their technical sense and with due regard to the provisions of existing and applicable laws.

It is respectfully submitted, therefore, that the defendant's plea denying the jurisdictional power of the district court for Porto Rico to try the issues involved in this case before a jury at a "special" term of said court holden at Mayaguez

should have been sustained. The refusal of the trial court to heed such plea, it is submitted, constitutes reversible error.

Merits.

In the case of Perez *vs.* Fernandez, 202 U. S., 80, 91-92, this court, among other things, said:

> "Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights (*Kepner v. United States,* 195 U. S., 100, 122). This policy has been followed in dealing with Porto Ricans (President's message, December 5, 1899; Walton's Civil Law in Spain and Spanish America, 594). The new civil government was established by the act of April 12, 1900, commonly known as the Foraker act (31 Stat., 77). Section 8 of that act provides: 'That the law and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States.'" * * *

First. Under the laws of Porto Rico can an action be maintained by the father of a deceased minor child whose death was caused by the negligence of another to recover in a lump sum damages for the injury which he may have sustained by reason of such death?

Second. If so, did the trial judge correctly charge the jury as to the respective duties and obligations of the parties connected with the accident or concerned in the cause of action, and as to the measure of the damages to be awarded to plaintiff under the local law, in case he was found to be entitled to recover?

The first of these questions was squarely raised by defendant's demurrer to the complaint (4), and re-raised by its motion in arrest of judgment (10), both of which were overruled by the court (5, 10). Such action of the trial court was duly assigned for error (25).

The solution of the second question depends upon the propriety and effect of various portions of the court's charge which were duly excepted to, the overruling of such exceptions having been duly assigned for error.

FIRST.

The Civil Code of Porto Rico approved March 1, 1902, which became effective upon its approval (Garrozi *vs.* Dastas, decided January 7, 1907), contained, among other provisions, the following, viz:

"BOOK FOURTH, TITLE I, CHAPTER I.

"Obligations and Contracts. Obligations.

"General Provisions.

"SECTION 1055. Every obligation consists in giving, doing, or not doing something.

"SECTION 1056. Obligations are created by law, by contracts, by quasi-contracts, and by illicit acts and omissions or by those in which any kind of fault or negligence occurs.

"SECTION 1057. Obligations arising from law are not presumed. Those expressly determined in this Code or in special laws are the only demandable ones,

and they shall be governed by the provisions of the laws which may have established them and by those of this book in regard to what has not been prescribed by said laws.

"SECTION 1059. Civil obligations, arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code.

"SECTION 1060. Those arising from acts or omissions, in which faults or negligence, not punished by law, occur, shall be subject to the provisions of chapter second of title sixteen of this book."

"TITLE XVI, CHAPTER II.

"Obligations Which Arise from Fault or Negligence.

"SECTION 1803. *A person* who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"SECTION 1804. The obligation imposed by the preceding section is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

* * * * * * *

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

* * * * * * *

"The liability referred to in this section shall cease when the persons mentioned therein prove that they employed all the diligence of a good father or a family to avoid the damage."

The Code of Civil Procedure of Porto Rico approved March 10, 1904, which went into effect July 1, 1904, among other provisions concerning the "Parties to Civil Actions," contains the following:

"SECTION 51. Every action must be prosecuted in the name of the real party in interest, except as other-

wise provided in this Code. Appearance in court shall be made through an attorney legally empowered to exercise his profession under the provisions of this law."

"SECTION 60. A father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

Section 61 provides that—

"In every action under this * * * section such damages may be given as under all the circumstances of the case be just."

Prior to the adoption of the Code of Civil Procedure of 1904 an action to recover damages as such, for the death of a minor child which had been caused by the negligence of another, was unknown to the law of Porto Rico.

SECOND.

Assuming, however, that under the provisions of said Code of Civil Procedure the plaintiff, Castro, was capable of maintaining the present action, what of the administration of the cause by the trial court?

Referring again to the case of Perez *vs.* Fernandez, 202 U. S., 80, 96, it is said that—

"* * * Section 34 of the Foraker act established a United States District Court for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a district court of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and provides that it shall proceed therein in the same manner as a circuit court, the intention of

> Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both district and circuit courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: 'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.' The act of August 13, 1888 (25 Stat., 433), provides that the circuit courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the district court exercising the jurisdiction of a circuit court, in analogy to the powers of the circuit courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law."

It was conceded at the trial that the defendant company had not maintained a bar (barrera) or gate and a watchman at the crossing in question, and the trial judge instructed the jury that the failure on the part of defendant so to do constituted negligence *per se*.

The propriety of such instruction depends upon whether any statute or any municipal regulation having the force of law imposed upon the defendant company the duty of maintaining a gate and watchman at the intersection of its line of railway with a public highway.

The plaintiff contended at the trial that the Police Law of

Railroads of Porto Rico, approved January 13, 1888, and promulgated in the island February 17, 1888, and the regulations for the application thereof, also promulgated February 17, 1888 (War Department translation, 1899), were in force at the time of the accident complained of, and enjoined upon defendant the duty of maintaining both a gate and a watchman at said crossing.

Article 8 of title II of said Police Law of Railroads is as follows:

> "The railroads throughout their length shall be fenced on both sides. The *Secretary of the Colonies, after hearing the company,* if there be one, shall determine for such line the manner in which and the time when the fencing is to be made. When railroads cross others on the same level, gates shall be constructed which shall be closed and only opened when vehicles and cattle cross as provided for in the regulations."

The corresponding article of the regulations for the application of the Police Law of Railroads is as follows:

> "The owners or conductors of vehicles, horses, or other cattle may not, even to enter adjoining lands or to leave them, cross the railroads, but by such points fixed for that purpose. This prohibition includes also owners or drivers of carriages, shepherds and cattle men who leave their horses or cattle at liberty, and graze them in the zones adjoining the railroad."

The defendant, however, contended, and here contends, that said Police Law of Railroads and the regulations governing its application constituted a part of the political administrative code of Porto Rico in force prior to the American occupation; that they related to and affected only railroads which had been constructed and continued to be operated in the island of Porto Rico under a *government*

subvention, the enjoyment of which subvention carried with it the obligation of submitting to *government supervision and control.* A careful consideration of the detailed provisions of such law and regulations will plainly disclose the great difficulty, if not impossibility, of executing them in their entirety, caused by the change of political administrative control. For instance, the provision in article 8 of the law above quoted to the effect that *"the secretary of the colonies* * * * shall determine for such line the manner in which and the time when the fencing is to be made," was impossible of execution at the date of the accident here, because the Spanish secretary of the colonies referred to by the statute no longer had executive power in the premises, and no one had been designated by congressional or other proper authority to perform in his place and stead the functions pertaining to such office. In a similar manner article 7 of title II provides for the doing of certain acts "by the *governor of the province,"* and in other articles of the same law many other duties of various sorts and kinds are imposed upon the "governor of the province" and the "secretary of the colonies" and the "general government" which are not compatible with the changed conditions incident to changed political control.

This Police Law of Railroads was a necessary adjunct to the political power of Spain as it existed in the island of Porto Rico. In the absence of that political power, or a substitute therefor, this law became incapable of enforcement, and since the American occupation no law of railroads or municipal regulation bearing upon the point here at issue has been enacted. In the absence of such a law or such a regulation having the force and effect of law, it is respectfully submitted that the true rule governing the obligation of the railroad company was that it should have been held in law to the exercise of ordinary care and caution only in running its trains across the highway at the point of accident, and it was therefore error on the part of the trial court to

charge the jury that the failure to provide a gate and a watchman—their presence not being required by the terms of any existing law or any regulation having the effect of law—was negligence *per se*.

As to the Measure of Damages.

The references by the trial judge, in the course of his charge to the jury on this subject, to the principles which govern "in the State courts and courts of the United States" in similar cases was clearly erroneous and well calculated to confuse the faculties of gentlemen who had scarcely been made acquainted with the fact that such a body as a jury had any part or place in the administration of law.

The learned trial judge charged the jury, among other things, as follows:

> "Now, gentlemen of the jury, coming to the question of damages, these kinds of actions are *not* of very frequent occurrence in most of the States of the Union. They are brought to recover the loss of the prospective earning power of a minor. Parents are entitled in most of the States to whatever their children earn until they are twenty-one years of age."
>
> "This suit presents the case of a young lady 17 years of age, the daughter of a respected citizen, a young lady who had graduated from school, was about entering society. There is no evidence here for your consideration, that I heard, about any pecuniary value that the father expected to reap from her. Her station, position, and all that we heard no testimony on." * * * "There is no proof offered on the subject of the pecuniary value of this girl's life, I mean in the earning power." * * *

In practically the same breath he further charged with emphasis that—

> "in the State courts and courts of the United States, the measure of damages allowed is what would be the

> earning power of a child until he was 21 years of age, less the cost of maintenance, assuming him to be wrongfully killed by the negligence of the defendant."

Referring specifically to the plaintiff, he further charged that—

> "In the measure of damages, if there is any, the earning power which he would be entitled to would be one of the elements of damages."

If this action should have been maintained at all it is plain that only such damages could have been awarded "as under all the circumstances of the case be just," and it is plain that the jury, after having been told specifically that there was no testimony in the cause upon which an estimate of the earning power of the deceased could be based, and none "about any pecuniary value that the father expected to reap from her," should not have been instructed that in the United States "the measure of damages allowed is what would be the earning power of a child until he was 21 years of age, less the cost of maintenance, *assuming him to be wrongfully killed by the negligence of the defendant.*"

The law of the United States and the law of Porto Rico as to the ownership of the earnings of minors are distinctly opposed in principle. In the former, generally speaking, such earnings belong to the parent—the head of the household. In the latter the earnings and property of a minor are expressly declared by law to belong to the minor, *e. g.*—

"CIVIL CODE OF PORTO RICO.

> "Article 160. The ownership of property which a child not emancipated may have acquired, *or acquires by its work or industry or for any good consideration, is vested in the child*, and the usufruct in the father or mother who has him or her under his or her authority and in his or her company; but if the child, with the consent of the parents, lives independently of them, he or she shall be considered as emancipated

for all purposes with regard to said property and shall own it and enjoy the usufruct and administration thereof.

"Art. 161. The ownership and usufruct of what the child acquires *with the capital of his or her parents* is vested in the latter; but should the parents expressly assign to him or her the whole or a part of the profits which he or she may obtain, such profits shall not be chargeable to the latter in the inheritance."

"Art. 162. The ownership or usufruct of the property or income donated or left by will to a child not emancipated, to cover the cost of his or her education and instruction, is vested in him or her; but the father or the mother shall have the administration thereof if no other proviso has been made in the gifts or bequests, in which case the will of the donors shall be strictly observed.

"Art. 163. The parents have, with regard to the property of the children, the usufruct or administration of which belongs to them, *the obligations of every usufructuary or administrator* and the special obligations established by section 3, title 5, of the mortgage law."

It is true that the learned judge further along charged that—

"While you (the jury) are governed and required by the statutes of Porto Rico to render just damages, if you find damages are to be allowed, those just damages are controlled by rules and regulations which prevent anything like conjecture or guess work."

"The court has said that damages should be confined to the pecuniary loss suffered by the mother—in a case where a mother brought a suit for the loss of her son—and the loss of the comfort, society, *support* and protection of the deceased."

And again as follows:

"Now these seem to be the limitations put upon the allowance of damages here: the comfort and the society, the *support* and protection of deceased, and

> you heard the testimony on that subject; that the father had educated this young lady; that she was a comfort to him, and he enjoyed her society, which would be natural, and death has deprived him of that."

And still again, at the express request of the plaintiff, the court charged that—

> "The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another; that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, *the kind of a girl she was,* and take into consideration *the assistance that she might have been to her parents in future years,* and you may also consider the loss of society and comfort and *the reliance they could place upon her in future years.* And you may take into consideration *all these things* in determining what the plaintiff should receive as compensation for the loss they have received" (20).

In view of the provisions of the Porto Rico Code as to the ownership of the earnings of minors, and also as to the emancipation of females by marriage and the like, and also in view of the fact that, in addition to permitting the jury to consider "*the assistance* that she might have been *to the parents* in future years," the court neglected to charge the jury to consider the cost of her maintenance during those same "future years," it would seem that the verdict of the jury should not be sustained.

As to the Contributory Negligence of the Plaintiff.

The trial judge charged the jury that the driver of the coach in which deceased was riding at the time of the accident was the agent of plaintiff, and his negligence or want of skill

"inures against the plaintiff," "and if the driver was guilty of gross negligence or wantonly crossed that track * * * if he chose to whip up his horses and run the risk of crossing that track, * * * there can be no recovery whatever against this defendant. Because that would be such gross, wanton and reckless conduct on the part of the driver, which would be visited on the plaintiff, as to defeat this action.

"Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, willful or wanton, but that by the exercise of ordinary common sense, ordinary precautions, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off * * * and he could have checked his horses, *and he neglected to look up the track or take any precautions*, if you find that, *that would be a minor degree of negligence.* It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence *in not looking up and down the track or stopping when he got close enough to the track to see it.* * * * Now I hope you catch the distinction. If the action of the driver from the evidence, was rash, wanton, willful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, * * * then that was such reckless and wanton conduct as would defeat the action entirely and your verdict would be for the defendant if you find that fact.

"On the other hand, if you find *a lesser degree of* negligence, *amounting to which is called want of ordinary care* that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, *not to defeat the entire action*, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less" (18).

To this portion of the charge the defendant also seasonably excepted (21), and the overruling of such exception was assigned for error (26).

In New York Central R. R. Co. *vs.* Lockwood, 17 Wallace, 357, 382, this court adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence, saying:

> "If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities."

In Briggs *vs.* Spaulding, 141 U. S., 132, 147, this court, citing Percy *vs.* Millandon, 8 Mart., N. S., 68, then "a leading case for more than sixty years," said

> "that the correct mode of ascertaining whether an agent is in fault is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed upon him. That diligence and care must again depend upon the nature of the undertaking. There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect."

In Schofield *vs.* Chicago, Mil. & St. Paul Ry. Co., 114 U. S., 615, this court said that "in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could have seen it if he had looked, and could have avoided the accident by stopping until it had passed by, he was negligent in not looking,"

and the action of the trial court in directing a verdict for defendant was approved and its judgment was affirmed.

In the course of the opinion in that case this court also cited Railroad Company *vs.* Houston, 95 U. S., 161, a case in which the plaintiff, Houston, sued the Chicago, R. I. & Pac. R. R. Co. for the negligent killing of his wife at a village street crossing, to the following effect:

> "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees, in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others.
>
> "Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. * * * Under these circumstances the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

And concluded the matter as follows:

> "These views concur with those laid down by the Supreme Court of Minnesota in Brown *vs.* R. R., 22 Minnesota, 165, and are in accord with the current of decisions in the courts of the States."

In view of the principles thus laid down, it would seem that the instruction of the trial court to the effect that the failure of the driver "to look up the track or to take any precautions" when he got within a certain distance of the railroad and could see it, it being broad daylight, and could have

checked his horses in time to have avoided the oncoming train was but "a minor degree of negligence," "a mistake on his part," "a want of ordinary care," which would "not defeat the entire action," but would only "affect the extent of the damages and make" them, if any were suffered, "correspondingly less," constitutes reversible error, and is so whether the defendant was itself guilty of negligence in failing to maintain gates and a watchman or not.

Upon the whole case, as well as upon the errors specifically pointed out, it is respectfully submitted that the judgment of the United States District Court for Porto Rico should be reversed and the case remanded with instructions to award a new trial.

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